No. 11,554

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. R. MASON,
Appellant,

vs.

MERCED IRRIGATION DISTRICT,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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INDEX

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To the Honorable Francis A. Garrecht, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

J. R. Mason, appellant, respectfully petitions for a rehearing in the above entitled case and reversal of the order entered by this Court January 19, 1948, upon the following grounds:

The petition which is the base of this case presented one point, and only one point, as follows: "That said bonds and coupons listed in Exhibit 'C' are barred by the statute of limitations and that pursuant to the provisions of the final decree above quoted, petitioner so reports to this Court. * * * Wherefore, petitioner

prays that the unexpended funds in the hands of the Registrar * * * be paid by said Registrar to petitioner * * *". (R. 34.) The Exhibit "C" which accompanied this petition is shown. (R. 38.)

The Objections of J. R. Mason (R. 43/49) raised a question of law. The Court fixed a time for oral argument October 29, 1946 the record of which appears. (R. 105/126.) On November 12, 1946 Attorney Downey addressed a letter to the Court (R. 55) in which he argued,

> "It is our position that the court is now without jurisdiction to allow Mr. Mason to take the money if he now desires to do so. *If the statute of limitations has run as we contend, the court would seem to have no jurisdiction except to order the money returned to the Irrigation District. General equity authority would not seem sufficient to override a substantive rule of law.* * * * It is true that in the final decree the court said in effect that upon the expiration of the statute of limitations period the District might report back to the court for such action as the court deemed advisable. However, *we do not make our case upon that order* but upon statutory and substantive rules of law by virtue of which we claim that the court *cannot exercise discretion in the premises but can only apply the law as it exists* * * *" (Emphasis ours.)

Following further oral argument (R. 126/157) a minute order was entered, as follows, "It is ordered that the petition herein is denied." (R. 57.) Objections were filed to the proposed order (R. 58) for the

reasons shown. (R. 59/71.) The oral arguments on these objections are shown. (R. 157/199.)

When asked to show the applicable statute, Attorney Downey said,

> "I think there is no mention of limitations actually in the Act. I can find nothing there that does say there shall be a limitation. We have to go outside of the Act *and into state law to find the limitation in that regard.*" (Emphasis ours.) (R. 129.)

When asked if he would "be willing to have the restraints now embodied in the final decree stricken?" (R. 184) Attorney Downey answered, "We do not intend to propose that the final decree be revised or altered." (R. 185.)

The order of the District Court was entered two days later, and before appellant even received copy of the proposed order and decree, to the form of which he objected within the five days allowed by the rules. (R. 80/83.) It was again pleaded in this objection that "Disbursement of funds in the Registry of the Court in these cases is governed by Title 28 of Judicial Code, Secs. 851, 852, and the proposed order, if signed would clearly appear to be contrary to its explicit provisions." (R. 81/82.) This objection was "determined to be without merit" by the District Court. (R. 83.)

Appellee at no point in the District Court or this Court proved any right, title or interest in or to the funds in *custodia legis,* the disbursement of which

funds is governed by the provisions in Title 28, Judicial Code, Sections 851, 852 as pointed out in Point 4. (Brief for Appellant, pp. 6, 7.) Appellee argues in his brief, page 7, that this federal statute "can certainly have no application where there are two contesting claimants to the fund as in this case." This contention was vigorously denied in appellant's reply brief, page 13, as follows: "Appellee has not proven any right, title or interest in or to the funds in *custodia legis,* which funds may only be disbursed as provided in the final decree * * *".

Appellee is a statutory trust, all of whose money, land and property is dedicated a public trust. It is without any authority to claim the funds in *custodia legis.* The funds in *custodia legis* never did "belong" to appellee, except as trustee "for the uses and purposes" of the applicable state laws cited by appellant in his brief, especially at pages 19, 23.

Stats. 1943, Ch. 368, Sec. 22437 provides:

> "The title to all property acquired by a district is held in trust for its uses and purposes."

Sec. 24350 provides:

> "Any money belonging to a district may be deposited * * * in accordance with the general laws governing the deposit of public money."

Sec. 24352 provides:

> "Where arrangements have been made by the district with the R.F.C. for deposit of district funds in the Federal Reserve Bank of the U. S., such deposits may be made in that bank or any

branch of it without requiring any security or interest."

The only statute that appears to cover the final disposition of funds of a District in *custodia legis* is Code of Civil Procedure, Sec. 1274b. It provides that when such funds have not been paid out, the court

"must direct that such money be deposited in the State Treasury for the benefit of the owner thereof or his legal representative, to be paid to him whenever, within five years after such deposits, proof to the satisfaction of the State Controller and the State Treasurer is produced that he is entitled thereto. * * * If no one claims the amount, as herein provided, the money devolves and escheats to the people of the State of California and shall be placed by the State Treasurer in the School Fund." (Stat. 1931, p. 1955.)

Ch. 368, Sec. 27518 provides:

"Whenever all the property of a district has been disposed of and *all* the obligations thereof, if any, have been discharged, the balance of the money of the district shall be distributed to the assessment payers * * *".

Therefore, under no circumstances can the funds in *custodia legis* be lawfully claimed by appellee as "belonging" to it, and Secs. 851, 852 of Judicial Code, Title 28, authorizes no "equitable" jurisdiction for funds in *custodia legis* under any circumstances. Bktcy. Act § 66, sub. b; 11 U.S.C.A. § 106, sub. b; *In re Bishop,* 72 F. Supp. 199 (U.S.D.C. N.J.).

The petition on which this case is based, did not ask or even suggest that the District Court could or should give appellee the funds in the Registrar's hands within 45 days, or any other period of time, unless the Court found that "the statute of limitations applicable to the still outstanding obligations" as provided in the final decree had run, as a matter of law.

Although the District Court, not finding any applicable statute, denied the petition in its minute order (R. 57), it later reversed and ruled the statute had run. (R. 96.) It is from this order that this appeal was taken. The District Court allowed appellant time for appeal in its order of January 22, 1947. (R. 87.) The order by this Court did not modify that order, which this Court may have overlooked, when it said "The order will be modified by striking therefrom the phrase 'from the date hereof' * * *".

This Court also found that "There was and is no such statute" (of limitations applicable to the still outstanding bonds and coupons listed in Exhibit "C", above), and having so found, the petition should have been denied. Instead of denying the petition, this Court announced that the one and only point presented in the petition "need not be considered; for after reaching the conclusions mentioned, the Court concluded that it was 'nevertheless vested with equitable power and authority to authorize the owners of said bonds and coupons an additional period of 45 days' * * *".

This order, instead of allowing appellant an "additional" time within which to claim the money in *custodia legis,* did exactly the opposite.

In allowing this assignment of funds in *custodia legis,* the order and decree as it stands is not only a novation, without warrant of law, but, in view of the injunctive provisions in the final decree of July, 1941 (R. 27, 28), it jeopardizes appellant's rights to the extent that unless he deposits his bonds within 45 days, his "still outstanding" bonds, most of which are neither lawfully due or payable, and none of which are redeemable before their fixed due dates, will still be "outstanding obligations", so recognized by the final decree, and still a lawful investment for savings banks and trust funds in California, but if the view of this Court that "All the old bonds were affected by the plan" prevails, they will, after 45 days become as worthless as other State and local government bonds which were made worthless because of some constitutional infringement such as in the *Browning v. Hopper* case, 269 U.S. 396. At no stage of the proceedings under Chap. IX was any claimant heard who even hinted that the ownership by appellant of the "still outstanding" bonds and coupons infringed any right secured by the Constitution of California, or the United States. That no such claim could be validly made was settled in *Fallbrook I.D. v. Bradley,* 164 U.S. 112; *Fallbrook v. Cowan,* 131 F. (2d) 513 (cert. denied); *Provident v. Zumwalt,* 12 Cal. (2d) 365, and other cases too numerous to cite.

Therefore, if the injunctive provisions in the final decree, in so far as they might be interpreted as applying to the "still outstanding" bonds, is not stricken or clarified, and the funds in *custodia legis* are paid out after 45 days without regard to the clear terms and provisions fixed in the final decree, appellant will be prejudiced even more than by anything contained in any order or decree in the Ch. IX proceedings.

Whether "the person who drafted the final decree assumed that there was a statute of limitations" is immaterial. The final decree proposed did provide a fixed limitation period. (R. 22/25.) The final decree which was signed and entered contained none. (R. 26/29.) The opinion of this Court affirms the contention of appellant that "There was and is no such statute" (of limitations applicable to the still outstanding obligations).

It is further submitted that nothing in any order or decree of the proceedings under Ch. IX went so far as to hold that "*All* the old bonds were affected by the Plan", as said by this Court in footnote 6, page 3, of its opinion. The final decree expressely designated and recognized the bonds owned by appellant as "still oustanding obligations", and excepted them from the injunctive provisions in paragraph 3 in clear language, as follows: "That *except* as provided in paragraph 2 hereof, all the old bonds and other obligations of petitioner *affected by the plan* * * * are hereby cancelled and annulled". Had the Court intended to include the "still outstanding" bonds, it could as easily have said "*All* the old bonds

are affected by the plan, and they are *all* hereby cancelled and annulled."

But even had *all* the old bonds been "affected" by the "plan", which appellant has always denied, and here again denies, that point is wholly unrelated to the instant case, which is bottomed on the petition filed by appellee July 23, 1946, more than 5 years after the final decree in the proceeding ruled by the Federal statute, 11 U.S.C.A. 401-403.

Appellee at all times not only recognized but insisted that State law and decisions must govern and control the rulings upon the petition filed July, 1946, and which forms the base of the instant case, saying (R. 55),

> "* * * We do not make our case upon that order (the final decree) but upon statutory and substantive rules of law by virtue of which we claim that the Court can not exercise discretion in the premises *but can only apply the law as it exists.*" (Emphasis ours.)

In addition to the above grounds, appellant also stands upon all the other points presented in his briefs, and in the record (R. 201), and also expressly reserves the right to urge in the Supreme Court of the United States, and in the California Courts that the United States Circuit Court of Appeals has not acquired federal jurisdiction of the appeal herein.

If there is any statute of limitations applicable to the claims of either party in this case, it is applicable to appellee, who unnecessarily and inexcusably waited

more than five years to get an interpretation upon the force and effect of the final decree of July 14, 1941. This was covered in the reply brief for appellant, pp. 10, 11. No right, shown or even claimed by appellee has been damaged by reason of the fact that appellant has preferred to leave the money dedicated to be paid for his claim in the Registry of the Court, rather than in some bank also without interest.

Nothing ordered in the Ch. IX proceeding "required" appellant to withdraw the funds in *custodia legis* until he desired to do so. No interest is paid upon such funds, and nothing in Chapter IX of the Bankruptcy Act, or in any applicable Federal statute fixes a time limit within which such funds are subject to any escheat, and no limitation was placed in the final decree, which appellee at all stages of the instant case, also insists is *res adjudicata.*

It is submitted that the view expressed in the instant opinion of this Court that "The interlocutory decree * * * *required* appellee to deposit" funds with the Registrar, is not accurate.

The provisions of Ch. IX have been construed as inhibiting the Court "requiring" anything to be done by the bankrupt, unless allowed by State law and decisions. *Spellings v. Dewey,* 122 F. (2d) 652, Cir. 8; *Green v. City of Stuart,* 135 F. (2d) 33, Cir. 5 (cert. denied).

Nothing contained in Ch. IX authorizes the Federal Court to "require" even the holder of one single

bond to deposit his bond with the Court, or its Registrar, even though it is true that he is not entitled to get the funds in *custodia legis* without depositing the bonds with the Registrar.

The only provision for enjoining suits by bondholders is in Sec. 403(c), as follows:

> "Upon entry of the order fixing the time for the hearing, or at any time thereafter, the judge may upon notice enjoin or stay, *pending the determination of the matter,* the commencement or continuation of suits against the petitioner * * * *except where rights have become vested,* and may enter an interlocutory decree providing that the plan shall be temporarily operative * * *". (Emphasis ours.)

The statute is carefully drawn and does not authorize any restraint or injunction to be embodied in the final decree, and it was an error of law when this Court allowed the restraint complained of, to stand, and also assigned the funds in *custodia legis* to the bankrupt after 45 days, while deciding "There was and is no such statute." The Court below was urged to strike the unauthorized restraints in the final decree. (R. 43/49.) This same point was raised in the appeal, and presented under Point 6, at pages 22/26 in brief for appellant.

> "To effect a forfeiture, which the law does not favor, the evidence must be clear and convincing and must not call upon a court of equity to do an inequitable thing".
>
> *Hendrix v. Altman Lbr. Co.,* 145 F. (2d) 501, Cir. 5.

Even had there been a statute of limitations applicable to the claim of appellant, that fact, without more, would not make it equitable for a Court to assign the funds in *custodia legis* to appellee, without a showing and proof that those funds belong to appellee, under the law.

Appellee charges in his brief (p. 15) "Appellant has persistently and continuously for many years refused to accept the deposited money and surrender his bonds". The Record shows this statement is unwarranted and unfair. The Court asked appellant:

> "Now may I ask you a question. You do not have to answer it unless you want to. Are you willing to accept the amount which the other bondholders have accepted for their obligations?
>
> Mr. Mason. Your Honor, I am willing to accept it under protest." (R. 119.)

> "Mr. Mason. * * * If you tell me that I either must unqualifiedly accept the offer or I am alienated, if that is the demand or suggestion, I would just like to know.
>
> The Court. I haven't made any suggestion. I have asked you a question". (R. 121.)

This conclusively refutes the above charge that "Appellant has persistently and continuously for many years refused to accept the deposited money * * *". It also proves the falsity of the accusation, "Appellant actually defies the Court and the law as declared by the Supreme Court." (p. 17.)

Appellant has at all times been willing to take his prorata of the funds in *custodia legis* without preju-

dice to his right to contest the amount or the right to additional compensation according to the laws of California applicable to the bonds and coupons owned by him. The Court refused this acceptance. (R. 119/126.)

The order and decree of this Court, if it stand, has the force and effect of an assignment of the trust fund in *custodia legis,* and also of a novation from the final decree in the Chap. IX proceeding, and unless the injunctive provisions in the final decree are also set aside, the vested rights of appellant as the owner and holder of $17,000 Merced Irrigation District original, unrefunded General Obligation 6% Gold Bonds, recognized in the final decree as constituting "still outstanding obligations", and secured against impairment both by the Constitutions of California and the United States will, within 46 days after the instant decree becomes final have become worthless in the hands of appellant, although still valid and binding obligations according to the Constitution and laws applicable in California, and also by decisions of the Supreme Court of the United States, which decisions are still controlling, and were not reversed by the *U. S. v. Bekins,* 304 U.S. 27, case, or by any decision of the United States Supreme Court either before or after the *Bekins* case.

The constitutional principles governing and controlling the rights of owners of land and bond obligations like those owned by appellant have been construed and applied in countless cases, among which are cited:

Fallbrook I. D. v. Bradley, 164 U.S. 112;
Mobile County v. Kimball, 102 U.S. 691;
Houck v. Little River District, 239 U.S. 265;
Hancock v. Muskogee, 250 U.S. 454;
Branson v. Bush, 251 U.S. 189;
Milheim v. Moffat Tunnell, 262 U.S. 710;
Roberts v. Richland I. D., 289 U.S. 71;
Huddleson v. Dwyer, 322 U.S. 232;
American Sec. Co. v. Forward, 220 C. 566 (affirmed 294 U.S. 692).

The California Irrigation District law is, at bottom, a rent control law, under which encumbrances and liens are fixed on the rents, issues and profits of restricted land within the domain of the State. The bonds of such districts are rent trust certificates, secured by the ground rent until paid, and whether such rent is collected by the district by way of an annual ad-valorem assessment, or as a beneficent landlord. *Provident v. Zumwalt,* 12 Cal. (2d) 365; *Moody v. Provident,* 12 Cal. (2d) 389. The levy, collection and enforcement of such land value taxes is subject to State law, and no interference by Congress is constitutionally possible. *Arkansas Corp. v. Thompson,* 313 U. S. 132. Nothing contained in 11 U. S. C. A. 401-403 or in the hearings or debates suggests that Congress intended to give its Courts any power to interfere in any way with the sovereign power of a State to tax and control the tenure or ground rent of land within the domain of the State.

It is clear that any order by the Federal judiciary to allow the States, or their taxing arms to circumvent or repudiate their fixed obligations to publicly collect ground rent arising from land within the domain of the State, would unconstitutionally interfere with what the Supreme Court has called "the unrestrained power of the State over political subdivisions of its own creation." *Faitoute v. Asbury Park,* 316 U. S. 502, 509.

The order and decree of this Court, if it stand, has not only the force and effect of making an unconstitutional gift of ground rent to feudal interests with no legal or equitable claim to it, but also of depriving appellant of his property, as owner and holder of the $17,000 lawful bond obligations of Merced Irrigation District, in violation of the 5th and 14th Amendments, and Section 10 of Article I of the U. S. Constitution, and also in violation of Article I, Section 16; Article I, Section 21, and Article XIII, Section 6 of the California Constitution.

> "One branch of the Government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small measure on a *strict* observance of this salutary rule." (Italics ours.)
>
> *Sinking Fund Cases,* 99 U. S. 700, 718.

For the foregoing reasons, and the other points raised in the appeal, none of which are abandoned, it is submitted that the judgment of this Court should be

reversed and the cause remanded with directions to dismiss the petition upon the ground that "there was and is no statute", and that to such end this petition for a rehearing should be allowed.

Dated, San Francisco,
February 14, 1948.

J. R. Mason,
Appellant Pro Se.

CERTIFICATE.

I hereby certify that I am the appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
February 14, 1948.

J. R. MASON,
Appellant Pro Se.